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ALEXANDER L. STEVAS,
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CASE NO. 84-921

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellants have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellants argue strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, Appellants submitted no evidence and testimony with regard to same in the Trial Court. The Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute, the Trial Court rejected this contention both factually and legally.[1] Even if such were a factual issue, it has been resolved against

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[1] Delta Air Lines, Inc., v. State of Florida, Department of Revenue Case No. 84-929

the evidence and testimony presented by the Appellants, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

Virtually all of the Appellants' argument is premised on the false assumption that the taxes imposed under Chapter 212, Florida STatutes, are user fees. This is not, and never has been true.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES

OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Both these points will be considered together.

A. THE TAX IS AN EXCISE TAX, NOT A USER FEE.

The highest Court in Florida has construed the statute, Chapter 212, Florida Statutes, as a statute imposing a tax on vendors for the privilege of engaging in business and exercising the taxable events and transactions provided for therein. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959); Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964). This determination by the Florida Supreme Court is consistent with similar determinations

which have been made by this Court on numerous occasions when analyzing and determining the type of tax imposed by state law and in determining the legal incident which gives rise to such tax. See Edelman v. Boeing Air Transport,Inc., 289 U.S. 249 (1933), Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932) and United Airlines v. Mahin, 410 U.S. 623 (1973).

In Eastern Air this Court considered a statute extremely similar to Chapter 212, Florida Statutes. (See footnote at page 151 of said decision, where the statute is quoted in its entirety.) In that case, the Court pointed out that the tax was imposed against the dealer for the privilege of carrying on the business of selling

gasoline within the state. In Boeing Air, the tax was imposed at the time the gasoline was withdrawn from the tanks for use in the aircraft. The statute in the case at bar imposes a tax on the legal incident of sale or transfer and collects same on such first sale or transfer which is generally the first withdrawal from storage for use. In the Mahin case, the tax involved was a general revenue use tax applying to the privilege of using tangible personal property in the state. The tax involved in that case, was imposed on the legal incident of storage or withdrawal from storage of the fuel. This Court upheld the state taxes in all such cases and the decision of the Florida Supreme Court in the instant case has reached a

similar conclusion in upholding the Florida statute. Thus, the Florida Supreme Court's decision is consistent with the decisions of this Court interpreting similar statutes from other states. Accordingly, this appeal does not present a substantial federal question, and based on the decisions reached by this Court in the aforementioned cases, it is manifest that the questions on which the decision in this cause depend are so insubstantial as not to need further argument. This Court has held that on appeal from a State Court judgment in an action challenging the constitutionality, the United States Supreme Court will defer to the State Court's determination that the taxable event is storage rather than the consumption of the fuel, where

there is no reason to ignore or to disagree with such determination. United Airlines v. Mahin, 410 U.S. 623 (1973); United States v. Burnison, 339 U.S. 87 (1950). In this case, the Supreme Court of Florida has construed the tax imposed under Chapter 212, Florida Statutes, as an excise tax, imposed on the vendor for the privilege of engaging in business, and has held, based on the statutory language, that the tax is imposed on the incident of the first sale or transfer within the State, which generally occurs on the first withdrawal or withdrawal for use from storage of the fuel. This is significant because the Appellants' argument is premised on the statement that the Supreme Court of Florida erred in concluding that the tax imposed

was a sales tax imposed on the vendor for the privilege of engaging in business, instead of a user fee. The cases cited by the Appellants are cited for authority premised on the false assumption that the tax imposed is a user fee.

This Court in its decision in Commonwealth Edison Company v. State of Montana, 453 U.S. 609, (1981) pointed out the distinction and stated that those cases in which the Court reviewed challenges to "user" fees or taxes must be put aside and cited the case relied upon by the Appellants, Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). The decision of the Florida Supreme Court recognized this distinction, and cited both the Montana

case, and the Evansville case, and properly applied the distinction as drawn by this Court in the Montana case. Thus, the Florida Supreme Court's decision is consistent with this Court's prior decisions in both cases. It specifically held that the tax was unlike the true "user fee" or "user tax". The Florida Supreme Court's determination that the involved tax is an excise tax and not a user fee, should be binding and controlling on this issue.

B. INTERSTATE COMMERCE

The Florida Supreme Court's determination that the tax is an excise tax and not a user fee is actually decisive in part of the Appellants' argument with regard to the four prong test cited in Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977). The Florida Supreme Court's decision cites the Brady case, listed each

of the four prongs and considered and applied each of same adversely to the contentions argued by the Appellant. Appellants contended that the tax offended the last two prongs of the test set forth in Brady, in that it discriminated against interstate commerce and was not fairly related to the services provided by the State. The Florida Supreme Court rejected this, and properly so.

The Appellants' contention that the tax is not fairly related to the services provided by the State misconceives the nature of the tax imposed under Chapter 212, F.S., and is premised on the false assumption that the imposition is a user fee instead of an excise tax. This has

been discussed previously and it has been pointed out that under this Court's previous decisions, no specific inquiry is required into whether or not the tax is fairly related to the services provided by the State, where the State must demonstrate a specific or direct benefit flowing when, as in the instant case, the tax is a general revenue tax such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, supra. In this Court's decision in the Montana case, it recognized that the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

This Court reached a similar decision in the case of Carmichael v. Southern Coal & Coke Company, 301 U.S. 495 (1937), so the Appellants' contention that a specific judicial inquiry is required in which an amount of specific benefit may be ascertained, has already been foreclosed and resolved against the Appellants' contention by this Court in other decisions. The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly no substantial federal question exists.

With regard to the Appellants' contention that the statute singles out airlines and classifies them improperly, this contention too has already been re-

solved by decisions of this Court adverse to the contentions of the Appellants. In this Court's decision in Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933), the Supreme Court upheld a state statute imposing an excise tax on the privilege of engaging inthe gasoline business, the proceeds of which were used solely for construction and maintenance of highways. The railway contended that since it was a railway and did not use the state highway system, that the statute discriminated against it. The rail carrier purchased large quantities of gasoline outside of the State of Tennessee and brought them into the State in tank

cars from which it was unloaded and stored in the railway's own storage tanks. None was sold by the railway but all was withdrawn and used by it as a source of motor power in interstate railway operation in Tennessee, Kentucky, Alabama, or Georgia. The Court held that the allegations of the railway showing a heavier burden of taxation imposed upon railroads than upon common carriers by motor bus, fell short of alleging discrimination forbidden by either the Commerce Clause or the Fourteenth Amendment. Furthermore, it should be remembered that other competing carriers engaging in interstate commerce, are required to pay other taxes on purchases of fuel under Chapters 206 and

207, Florida Statutes, which are not imposed upon airlines. All airlines pay the same tax as would be imposed on an individual person purchasing fuel from a service station. This is so because the tax is on the first withdrawal or use and is collected on the first transfer, and since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Since this legal incident can occur only once, as this Court stated in Montana, there can be no question regarding apportionment or potential multiple taxation. Substantial nexus clearly exists and since there is no danger of multiple taxation, because the legal incident of withdrawal and first transfer can occur

only once, both the first and second prongs of the Brady test are met. Furthermore, there is no singling out interstate business because the same tax is imposed on the first transfer of fuel, whether it is to be used in intrastate, interstate or foreign commerce or transportation.

That a state may classify persons and property for tax purposes has been uniformly recognized by this Court in numerous of its decisions, many of which were cited and relied on by the Florida Supreme Court in its decision. Basically, the Appellant is contending that it should be allowed to apportion the taxes imposed under Chapter 212, Florida Statutes, but the Florida Supreme Court's decision that such was not required is amply supported by the decisions of this Court. See Allied Stores

of Ohio v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1948); Carmichael, Wallace, and Montana. Airlines certainly benefit from a good road transportation system, and as the Florida Supreme Court pointed out Appellant operates in many of the major airports throughout the State, operating a commercial airline for profit. The persons and property which are transported through the air by airlines do not come to rest at the airports, but must generally use the public roads and highways of the State in automobiles or trucks, or some other means of public transportation to arrive at their ultimate destination. The Florida Supreme Court applied all the prongs of the four prong test set forth in Brady in precisely the same manner as they have been applied by this Court in its decisions. Thus, the

Florida Supreme Court's decision is consistent with this Court's decisions and the federal question presented is plainly insubstantial. Furthermore, as the Florida Supreme Court noted in its' decision in Eastern Airlines v. State of Florida, Department of Revenue, 465 So.2d. 311 (1984), pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean which permits airlines to avoid the accumulation of intrastate mileage.

With regard to the Appellant's contention that the rate applied violates the Commerce Clause, this contention is wholly without merit. The statute imposes the tax at a fixed rate of 5% on a fixed price per gallon of $1.148. The purpose of this is because the tax can only be effectively

collected on its first withdrawal from storage or distribution and at that time the wholesalers do not know the ultimate retail price to be set by the retailers. Thus, by fixing a price per gallon, the statute can be readily administered and the tax collected. Furthermore, the Legislature could just as easily have established the rate at a fixed amount per gallon sold, such as 6 cents per gallon or 9 cents per gallon and although the price charged per gallon may differ, the amount of tax collected would be the same. In fact, a license tax imposing a flat rate of 6 cents per gallon was upheld by this Court in Eastern Air Transport. The Supreme Court's decision is consistent with this Court's pronouncement in the Montana

case which held that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution. As this Court recognized in Carmichael, administrative convenience and expense in the collection and measurement of the tax are alone a sufficient justification for the difference between treatment. §212.70(2), Florida Statutes, contains the legislative finding as to convenience and necessity. Thus, the Appellants' contentions are plainly insubstantial. All air transport and individual persons in Florida pay the same tax on the purchase of fuel in Florida without regard to the fact that the fuel may ultimately be used in a vehicle which may be leaving the State. This is so because the tax is on the first

withdrawal or use and is collected on the first transfer. Furthermore, since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Second, since the tax is an excise tax on the privilege of engaging in the business of selling special fuel and motor fuel, and not a user fee, it is not necessary to examine and determine if there is a direct benefit flowing to the Appellant. Thus, the Supreme Court's decision is squarely consistent with this Court's decision in Montana and in this Court's application of the four prong test set forth in Brady.

The Supreme Court's determination that

the tax is on the legal incident of withdrawal for use from storage is also consistent with this Court's decision in Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932), Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933), Nashville, Chattanooga, & St. Louis Railway v.Wallace 288 U.S. 249 (1933). and United Airlines v. Mahin, 410 U.S. 623. (1973) These cases recognized that the legal incident which gave rise to the taxes imposed was on the withdrawal from storage or use and sustained the taxes involved in all three cases. Thus, the Florida Supreme Court's decision is consistent with these prior United States Supreme Court decisions, and accordingly no substantial federal question

exists, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

C. EQUAL PROTECTION CLAUSE

The Florida Supreme Court held that no violation of the Equal Protection Clause occurred and this decision is consistent with the decisions of this Court dealing with legislative classification for tax purposes. The test to be applied in examining the state classification, has been set forth by this Court in several cases including Madden, Allied Stores, and Carmichael. The Florida Supreme Court cited and applied these cases. Furthermore, virtually the identical issue was before this Court in the Wallace case,

where the objection was made that a heavier burden of taxation was imposed upon railroads than upon common carriers by motor bus, and that the tax was earmarked for roads which the railroads did not use. As has been previously demonstrated herein, other common carriers traveling by road, water, or railway, pay fuel taxes which are not required to be paid by airlines, and do not enjoy certain relief from imposition of ad valorem taxes as is enjoyed by airlines.

The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly the questions raised are plainly insubstantial.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to

grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

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PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 1, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC., by mailing copies in duly addressed envelopes, with first class postage prepaid, to Thomas F. Luken, 1290 East Oakland Park Boulevard, #200, Fort Lauderdale, Florida 33334.

All parties required to be served have been served.

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